

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

United States of America, Complainant v. L&M Tire Company, Inc.,
Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 89100526.

ORDER GRANTING IN PART COMPLAINANT'S MOTION
FOR SUMMARY DECISION

I. Procedural History

On December 26, 1989, Complainant filed a Motion for Summary Decision. Respondent filed a response to Complainant's Motion on January 10, 1990. On January 11, 1990, I issued an Order granting a continuance in this case.

The Complaint is charged in three Counts. Count 1 alleges that Respondent knowingly hired an alien unauthorized to be employed in the United States in violation of section 1324a(a)(1)(A) of Title 8 of the United States Code. Counts 2 and 3 allege that Respondent failed to properly prepare the I-9 Employment Eligibility Verification Form in violation of section 1324a(a)(1)(B) of Title 8 of the United States Code.

II. Legal Standards in a Motion for Summary Decision

The federal regulations applicable to this proceeding authorize an Administrative Law Judge to ``enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.'' 28 C.F.R. section 68.36 (1988); see also, Fed. R. Civ. Proc. Rule 56(c).

The purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and judicially-noticed matters. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2555. 91 L.Ed.2d 265 (1986). A material fact is one which controls the outcome of the litigation. See, Anderson v. Liberty Lobby, 477 U.S. 242, 106 S. Ct. 2505, 2510 (1986); see also, Consolidated Oil & Gas Inc. v. FERC, 806 F.2d 275, 279 (D.C. Cir. 1986) (an

agency may dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that no dispute of facts is involved).

Rule 56(c) of the Federal Rules of Civil Procedure permits, as the basis for summary decision adjudications, consideration of any ``admissions on file.'' A summary decision may be based on a matter deemed admitted. See e.g., *Home Indem. Co. v. Faularo*, 530 F. Supp. 797 (D.C. Col. 1982). See also, *Morrison v. Walker*, 404 F.2d 1046, 1048-49 (9th Cir. 1968) (``If facts stated in the affidavit of the moving party for summary judgment are not contradicted by facts in the affidavit of the party opposing the motion, they are admitted.''); and, *U.S. v. One-Heckler-Koch Rifle*, 629 F.2d 1250 (7th Cir. 1979) (Admissions in the brief of a party opposing a motion for summary judgment are functionally equivalent to admissions on file and, as such, may be used in determining presence of a genuine issue of material fact).

Any allegations of fact set forth in the Complaint which the Respondent does not expressly deny shall be deemed to be admitted. 28 C.F.R. § 68.6(c)(1) (1988). No genuine issue of material fact shall be found to exist with respect to such an undenied allegation. See, *Gardner v. Borden*, 110 F.R.D. 696 (S.D. W. Va. 1986) (``. . . matters deemed admitted by the party's failure to respond to a request for admissions can form a basis for granting summary judgment.''); see also, *Freed v. Plastic Packaging Mat. Inc.*, 66 F.R.D. 550, 552 (E.D. Pa. 1975); *O'Campo v. Hardist*, 262 F.2d (9th Cir. 1958); *United States v. McIntire*, 370 F. Supp. 1301, 1301, 1303 (D.N.J. 1974); *Tom v. Twomey*, 430 F. Supp. 160, 163 (N.D. Ill. 1977).

III. Legal Analysis

I find and conclude that there is no genuine issue of material fact regarding the allegations contained in Counts 2 and 3 of the Complaint, and that Complainant is entitled to a summary decision on these Counts.

With respect to Count 1, however, it is my view that there is a genuine issue of material fact, and that the question of liability is better decided after conducting an evidentiary hearing.

As stated, Count 1 involves an allegation that Respondent hired an individual named Antonio Juarez Mendoza ``knowing'' that Mr. Mendoza was not authorized to be employed in the United States. I note that I have not previously decided a Motion for Summary Decision involving an allegation of a ``knowing'' hire.

Courts are generally reluctant to render summary decisions in actions involving issues of state of mind. See, e.g., *Consolidated Elec. Co. v. U.S. for Use & Benefit of Gougn Indus., Inc.*, 355 F.2d

437, 438-39 (9th Cir. 1966) ('`When an issue requires determination of state of mind, it is unusual that disposition may be made by summary judgment. . . . It is important and ordinarily essential that the trier of fact be afforded the opportunity to observe the demeanor, during direct and cross-examination, of a witness whose subjective motive is at issue.''); See also, *Handi Inv. Co. v. Mobil Oil Corp.*, 550 F.2d 543 (9th Cir. 1977); and, *Wright, Miller & Kane*, 10A Federal Practice and Procedure, section 2730.

In its Motion papers, Complainant asserts that Respondent ``admits'' the factual allegations contained in Count 1. I disagree. A close examination of Respondent's answers to Complainant's Request for Admissions reveals that Respondent (who is not, unfortunately, guided by experienced legal counsel in this matter) gives an ambiguous and possibly conflictual response to the important question regarding its being ``on notice'' that Mr. Mondoza was not authorized to be employed in the United States. See, Respondent's ``Answer to Request for Admissions.'' In its ``answer,'' Respondent states that it is ``unable to verify'' whether it was ``on notice'' that Mr. Mendoza's application for legalization had been ``statutorily denied'' or that his employment authorization to work in the United States had ``expired on January 3, 1989.'' Respondent's answer is ambiguous because it neither admits nor denies this particular Request for Admission, and also because it appears to conflict with its apparent admission that Mr. Mendoza had presented to it an immigration document which facially contained information indicating that Mr. Mendoza's application for legalization had been denied and that he was not authorized to be employed in the United States.

It is, however, well-established that all favorable inferences that are reasonably possible in analyzing a motion for summary decision should be drawn on behalf of the non-moving party. See e.g., *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460 (2d Cir. 1989); *Schwabenbauer v. Bd. of Education*, 667 F.2d 305, 313 (2d Cir. 1981) ('`In determining whether or not there is a genuine factual issue, the court should resolve all ambiguities and draw all reasonable inferences against the moving party.''); see also, *Wright & Miller & Kane*, Federal Practice and Procedure, v. 10A, section 2727, at 125; and, Comment, ``The Effect of Presumptions on Motions for Summary Judgment in Federal Court,'' 31 UCLA L. Rev. 1101 (1984). In this regard, I intend, in this case, to reasonably and favorably infer that the ``ambiguity'' of this pro se Respondent's answers to Complainant's Request for Admissions does not constitute an ``admission'' that it knowingly hired an alien unauthorized for employment in the United States.

Accordingly, I am denying Complainant's Motion for Summary Decision as to Count 1.

ULTIMATE FINDINGS AND CONCLUSIONS OF LAW

I have considered the pleadings, memoranda, briefs and affidavits of the parties submitted in support of and in opposition to the Motion for Summary Decision. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following findings of fact, and conclusions of law:

1. As previously found and discussed, I determine that no genuine issue of material fact has been shown to exist with respect to Counts 2 and 3 of the Complaint, and that, therefore, pursuant to 28 C.F.R section 68.36, Complainant is entitled to a Summary Decision on these specified Counts of the Complaint.

2. That Respondent violated 8 U.S.C. section 1324a(a)(1)(B) in that Respondent hired, for employment in the United States, the individuals identified in Counts 2 and 3 without complying with the verification requirements in section 1324a(b), and 8 C.F.R. section 274a.2(b)(1)(i)(A).

3. That in determining whether or not there is a genuine issue of material fact, I will resolve all ambiguities and draw all favorable inferences against the moving party especially in instances involving issues regarding the state of mind of a Respondent.

4. That Respondent's ambiguous response to Complainant's Request for Admissions raises a genuine issue of material fact that is sufficient to preclude summary decision on Count 1.

Based upon my findings of fact and conclusions of law, it is hereby **ORDERED** that an evidentiary hearing shall be held on March 19, 1990, commencing at 9:00 a.m., at the Office of the Administrative Law Judge, 950--Sixth Avenue, suite 401, San Diego, California, to determine issue of liability with respect to Count 1. In addition, I further **ORDER** the parties to present relevant evidence as to the mitigating factors which should be considered by me in determining the amount of civil money penalty to assess against Respondent for those Counts, specified above, for which I have granted Complainant's Motion for Summary Decision.

SO ORDERED: This 28th day of February, 1990, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge